



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**(BIMA TOWERS)**

**CAUSE NO. 102 OF 2013**

**FONDO KALAMA**

**PETER KALOKI**

**PETER MUSEMBEI**

**ELKANA KITUKU**

**GETRUDE OSANYA**

**ANTHONY OCHIENG**

**STEPHEN MWAIGHO**

**SIMON MACHUKA**

**KAHINDI KADHENGI**

**KAZUNGU KODWEKA**

**LAWRENCE RONO**

**STEPHEN MURURI**

**JOSIAH WERE**

**FELIX ODHIAMBO**

**INNOCENT OMAR**

**DAGLAS OKELO**

**KIMANZI KITHEKA**

**HARRY MWANYUMBA**

**JAMES MASAKU**

v

**ANDERSON M MTALAKI**

**ALEX KATUMI**

**JOHN NYAMUSI (sued as Chairman,**

**Secretary and Treasurer respectively of Kenya Ports Authority**

**Makupa Welfare**

**Club/Centre.....RESPONDEN**  
**TS**

**JUDGMENT**

1. The Claimants filed a Memorandum of Claim on 8 May 2013 against the Respondents seeking
  - a) A declaration that the Respondents refusal to grant the Claimants a right of access to join a trade union of their choice is unfair, unlawful and therefore violates the Claimants fundamental rights and freedoms which is protected by law.
  - b) General damages for unlawful deprivations of the Claimants rights as workers.
  - c) An order authorizing the Claimants to join or enroll as members of a trade union of their choice.
  - d) Costs of the suit.
    - e) Any other or further relief which the court considers just and expedient to grant in the circumstances.
2. The Respondents were served and filed a Response to the Claim on 31 May 2013.
3. On 5 June 2013 the Court allowed the Claimants to file further documents and simultaneously granted leave to the Respondents to file additional/supplementary documents. Hearing was fixed for 11 July 2013.
4. The hearing did not proceed as scheduled on 11 July 2013 because the Respondents Counsel Mr. Sangoro was reportedly out of Mombasa. The hearing was adjourned to 9 September 2013.
5. On 9 September 2013 the parties informed the Court that the facts in issue were not in dispute and therefore sought that the Cause be determined on the basis of written submissions. The Court allowed the request and directed the Claimants to file and serve their submissions within 14 days and the Respondent within a further 14 days after service by the Claimants. The Cause was set for mention on 10 October 2013 to confirm compliance.
6. On 10 October 2013 none of the parties appeared and the Court directed the Deputy Registrar to serve notices on the parties to show cause why the Cause should not be dismissed. Further mention was set for 28 October 2013.
7. On 28 October 2013 the Claimants Advocate informed me that they had filed and served their submissions ( the submissions were filed late but there was a letter on record indicating Mr. Oguk for the Claimants had been admitted in hospital for almost two weeks-the submissions are therefore admitted). The Respondents were not represented and the Court fixed 6 December 2013 as date for delivery of judgment.( The Respondents filed submissions on 26 November 2013- over one month after the Claimants had filed their submissions and unfortunately the submissions made

- reference to two case authorities which were not attached).
8. Rule 21 of the Industrial Court (Procedure) Rules, 2010 empower the Court to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions by parties if the parties agree.

## The facts

9. The Claimants are employees of Kenya Ports Authority, Makupa Welfare Club/Centre which is a social members club of the employees of Kenya Ports Authority while the Respondents are the Chairman, Secretary and Treasurer respectively of Kenya Ports Authority Makupa Welfare Club/Centre.
10. The Claimants requested and or sought from the Respondents to join Dock Workers Union or the KUDHEIHA. The Respondents' responded that the Claimants being waiters, barmen, cooks, cleaners and kitchen cashiers could only join a union in consonance or relevant to their trade/employment and not the Dock Workers Union.
11. The Dock Workers Union wrote to the Respondents on 4 August 2011 forwarding authority forms for 16 newly recruited members. The letter asked the Respondents to deduct Kshs 50/- entrance fees and 2% of basic salary as monthly contribution.
12. On 2 November 2011 the Respondents responded to the letter informing the General Secretary of Dock Workers Union that

*according to the Dock Workers union constitution and Rules registered by the Registrar of Trade Unions on 23/12/2008 Rule No. 4 membership of the union section 4 states that 'membership of the union shall be open to all employees employed in the Port industry*

13. The Respondents were informing the General Secretary in short that the employees were not eligible to join the Dock Workers Union.
14. On 12 March 2012 the Dock Workers Union wrote again to the Respondent informing them that the employees had exercised their rights under the new constitution and Labour Relations Act to join the union and therefore the parties should sign a recognition agreement on 26 March 2012 and further that the Makupa Welfare Branch of the Dock Workers Union had been duly registered.

## The Law

15. It is opportune that the Court discusses the law applicable.
16. Before dealing with the law, I believe it is germane to overview the practice and procedure of the Industrial Court.
17. Rule 4(d) and (e) of the Industrial Court (Procedure) Rules, 2010 require a Claimant to set out in the Statement of Claim *the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed.... and any principle or policy, convention, law or industrial relations issue or management practice to be relied upon.*
18. The Claimants did not mention/comply with the rule in the Statement of Claim but only attempted to do so in the submissions. In the submissions, Articles 2(5), (6) and 41(2) of the Constitution were cited, together with ILO Convention No. 87.
19. The failure by the Claimant to comply with the aforesaid rules complicates the Courts duty because the Court is asked to rely on and interpret various provisions of the law without the benefit of hearing any submissions from the parties.
20. Article 2(5) and (6) of the Constitution provide that the general rules of international law shall form part of the law of Kenya and that treaties or conventions ratified by Kenya shall form part of the law of Kenya respectively. Article 41(2) of the Constitution on the hand provide every workers right to fair remuneration, reasonable working conditions, **form, join or participate in the activities and programmes of a trade union** and to go on strike.
21. Convention 87 concerns the Freedom of Association and Protection of the Right to Organise. It entered into force on 4 July 1950. This Convention does not appear in the list of conventions ratified by Kenya.
22. Sections 4 and 5 of the Labour Relations Act provides for employees right to freedom of

association and non discrimination for exercising the right of freedom of association while section 54 makes provision for recognition of trade unions by employers.

## Questions arising

23. The question presenting itself is about recognition of a trade union as representative of a simple majority of the unionisable employees of the Respondent or whether an employee is free to join any trade union of his choice.

## Evaluation

24. The principle of freedom of association is at the core of the ILO's values: it is enshrined in the [ILO Constitution](#) (1919), the [ILO Declaration of Philadelphia](#) (1944), and the [ILO Declaration on Fundamental Principles and Rights at Work](#) (1998). It is also a right proclaimed in the [Universal Declaration of Human Rights](#) (1948). The right to organize and form employers' and workers' organizations is the prerequisite for sound collective bargaining and social dialogue.

25. Trade unions therefore are imperative to ensure that workers achieve a living wage and decent working conditions. They offer the most effective and legitimate way to establish a fair deal for workers, by allowing them to stand together to defend their rights. This collaborative voice allows workers to express their views, which they may be too intimidated to do alone.

26. The International Labour Organisation states that the two central trade union rights, recognised as part of the minimum standards for workers rights, are freedom of association and collective bargaining. Freedom of association gives workers the right to form and join representative organisations of their own choosing in the workplace. Collective bargaining is the right of workers to join trade unions without fear of discrimination, to have their union recognised as the representative of its members, and to have it negotiate the terms and conditions of their employment on their behalf.

27. Freedom of association is the bedrock workers' right under international law on which all other labor rights rest. In the workplace, freedom of association takes shape in the right of workers to organize to defend their interests in employment. Most often, workers organize by forming and joining trade unions. Protection of their right to organize is an affirmative responsibility of governments to ensure workers' freedom of association.

28. But the right to organize does not exist in a vacuum. Workers organize for a purpose, to give unified voice to their need for just and favorable terms and conditions of employment when they have freely decided that collective representation is preferable to individual bargaining or management's unilateral power.

29. The right to bargain collectively stems unbroken from the principle of freedom of association and the right to organize. Protecting the right to bargain collectively guarantees that workers can engage their employer in exchange of information, proposals and dialogue to establish terms and conditions of employment. It is the means by which fundamental rights of association move into the real and enduring life of workers and employers. The right to bargain collectively is "real" implementation in the economic and social setting of the "ideal" civil and political rights of association and organizing.

30. In the case under discussion, it is not in dispute that 16 employees of the Respondent joined the Dock Workers Union. This is clear from the letter dated 4 August 2011 from the Union to the Respondent. The Respondent in response dated 2 November 2011 stated that the staff of the Respondent were not eligible to join the Dock Workers Union.

31. On 19 March 2012 the Union wrote again to the Respondents seeking that the parties sign a recognition agreement. It appears the Respondents stuck to their guns.

32. Answering the question whether an employee can join any trade union of his choice would be an academic exercise. I say so because within the industrial relations sphere, employees join unions not for the mere sake of exercising their freedom of association but for a purpose. The purpose is to offer the employees the most effective and legitimate way to establish a fair deal for workers, by allowing them to stand together to defend their rights. This collaborative voice allows workers to express their views, which they may be too intimidated to do alone. It is in furtherance of exercising the right to organise and collectively bargain.

33. Once the employees have exercised their freedom of association to join a trade union of their choice the law has provided that the trade union should seek for recognition from the employer. And to get recognition the trade union must demonstrate that it represents a simple majority of the employer's unionisable employees.
34. Section 54 of the Labour Relations Act provides for recognition of trade unions by employers.
35. The Dock Workers Union had started this process by sending to the Respondent the list of the employees who had signaled their membership. The Respondent replied stating that the Dock Workers Union was not the right union.
36. It was therefore incumbent upon the Dock Workers Union to move to Court to demonstrate that it had complied with the provisions of the applicable law and ask to be granted recognition.
37. It was not for the Claimants to move to Court seeking a declaration that the Respondent had refused to grant them a right of access or to join a trade union. They had already joined a trade union but the Respondent refused to deal with that trade union.
38. In my view what was in contention was the right of the Dock Workers Union to organise and engage in collective bargaining with the Respondent and the proper party to enforce such right was the Union and not the Claimants in their individual or personal capacities.
39. There is no real legal issue or dispute between the Claimants and the Respondents. The dispute should be one between the Dock Workers Union or any other such appropriate union and the Respondents on recognition. The Claimants have failed to establish that they have a clear right to the relief sought. They have failed to demonstrate any prejudice that they might suffer if the orders are refused.
40. In the circumstances, I do dismiss the Memorandum of Claim filed in Court on 8 May 2013 with no order as to costs, submissions having not been filed in time.

**Delivered, dated and signed in open Court in Mombasa on this 6<sup>th</sup> of December 2013.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Oguk instructed by S.O. Oguk

& Co. Advocates for Claimants

Mr. Sangoro instructed by

Muthoni Gatere Advocate, KPA. for Respondents